EQUAL PROTECTION AND THE PREGNANCY LEAVE CASE

Cases challenging employment practices relating to mandatory pregnancy leave for public employees[1] have reached courts of appeal in five circuits;[2] all five circuits have applied a rational relation test to the regulation attacked; three circuits found such regulations valid under the traditional rational relation test,[3] and two circuits, invalid[4] under the new "substantial rationality" test developed in recent Supreme Court equal protection cases.[5] Two of these pregnancy leave cases will be heard before the Supreme Court of the United States.[6]

The preliminary issue that arises in these cases is whether or not mandatory pregnancy leave rules classify by sex and thereby constitute sex discrimination. While some circuits state that such rules do not classify by sex, others take the position that any rule that applies to only one sex discriminates against that sex. Most judicial attention has been spent upon the threshold matters of whether or not a classification has been created; the courts tend to gloss over the more complex problem of which equal protection standard ought to apply, if a classification by sex is found.

Plaintiffs in these cases generally present arguments that women should be given suspect classification treatment and that pregnancy leave rules

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[1] The cases analyzed deal with pregnancy leave rules as applied to public employees. The pregnancy leave policies of private business are covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964). Pursuant to this act the Equal Employment Opportunity Commission has adopted a rule prohibiting pregnancy leave disability rules, 29 C.F.R. § 1604.10(b), 37 Fed. Reg. 6837 (Apr. 5, 1972). The statutory standard set forth in these regulations is strict and provides more protection than a compelling state interest standard of review. Thus the constitutional issues only arise through challenges of public employees who are not covered by Title VII, and for this reason, the cases which have been decided on the statutory ground are beyond the scope of this note. Title VII of the Civil Rights Act has since been amended to cover public schools and state agencies, 42 U.S.C. § 2000e(a), P.L. 92-261, 86 Stat. 103 (1972). This congressional section moots the pregnancy leave case arising after the Amendment.

[2] Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973) *rev'g on rehearing en banc*, 467 F.2d 262 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 23, 1973); La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 23, 1973); Schattman v. Texas State Employment Comm'n, 459 F.2d 32 (5th Cir. 1972); Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1972).

[3] Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973); Schattman v. Texas State Employment Comm'n, 459 F.2d 32 (5th Cir. 1972); Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1972).

[4] Green v. Waterford Bd. of Educ., 673 F.2d 629 (2d Cir. 1973); La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

[5] *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-48. *See also* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[6] Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 23, 1973); La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 23, 1973).

interfere with two fundamental rights: the right to procreate and the right to work. Alternatively they argue that sex classifications should be required to meet a higher standard of rationality than that embodied in the minimal rational relation test applied to economic classifications. The courts, however, have given these arguments little analytical attention. After setting forth the factual background of a typical pregnancy leave case, this note will deal with the technical question of whether such rules do classify by sex. It will then analyze the applicability of the various equal protection standards to sex classifications. Finally, this note will suggest that a pregnancy leave rule produces no equality injury and that the burdens imposed by such rules should be examined under due process standards rather than through equal protection.

The recent Sixth Circuit case of *La Fleur v. The Cleveland Board of Education*[7] provides a typical example of a pregnancy leave rule in operation. The Cleveland Board of Education required all pregnant teachers to take an unpaid leave of absence, from five months prior to delivery until at least three months after delivery. Once the teacher went on leave, she was replaced permanently by another. Upon return, she was reassigned and had no right to regain her former teaching position. Had pregnancy been treated like sick leave, pregnant teachers would have been able to use accrued sick leave days during their absences and would have been able to return to their prior teaching assignments. Each teacher would have been able to take leave as medical conditions and personal efficiency dictate; some would have been able to work right up until the time of delivery. Thus, if pregnancy were treated like sick leave, the pregnant teacher would be able to earn her usual salary for each working month beyond the cut-off date, and the financial cost to the Board would not change due to the necessity of hiring a replacement during the leave period. Since the pregnant teacher did not lose seniority for promotion purposes, other teachers received no competitive advantage from the pregnancy leave rule.[8]

Evidentiary hearings at trial centered largely around proof that pregnancy was a medical condition and ought to be treated as such. The expert witness for the Board conceded that he often advised his patients to work straight through until two weeks before delivery and admitted that each pregnancy should be treated, if possible, as an individual case. Evidence was adduced to the effect that efficiency and teaching ability diminished slightly during pregnancy, but there was no evidence that the mother's health or any other interest was in any way affected by, or related to, the three-month mandatory post natal leave. Although conceding that each pregnancy was medically unique and some pregnant teachers could

[7] 465 F.2d 1184 (6th Cir. 1972).
[8] *Id.* at 1186.

work until delivery, the Board justified the regulation principally in terms of administrative efficiency since the date for replacing the teacher was readily ascertainable. The Board also argued that the danger of assaults by students and the interruption of class by snide remarks justified the regulation. Though the *La Fleur* Court agreed that administrative burdens were lightened to a slight extent it insisted that the threat of assault and the prevention of snide remarks were not sufficient to counter the interests of the teacher in her employment. The court struck down the rule as failing to satisfy an increased rationality requirement under the equal protection clause.

I. Do Mandatory Pregnancy Leave Rules Discriminate on the Basis of Sex?

The first issue in the pregnancy leave case is whether these rules classify by sex. Alternative answers to the question exist. Since the rule applies only to women it can be viewed as a discrimination based upon sex. On the other hand, the rule can be viewed as dealing exclusively with a condition, and the fact that the condition strikes one sex alone can be considered fortuitous and irrelevant. Those circuits which view these regulations primarily as impositions upon women tend to strike them down on a substantial rationality requirement while those that consider them neutral regulations of pregnancy uphold them under a minimal rationality standard.

Quite obviously, the pregnancy leave rule applies to only one sex, but the issue the circuits should confront is whether a classification which burdens pregnancy burdens an entire sex. Typically the opinions state their conclusions without setting forth any detailed reason for taking one view as opposed to the other. For example, the Sixth Circuit, in *La Fleur*, referred to the explicit sex classification in *Reed v. Reed*[9] and reasoned that, "Here too, we deal with a classification which is inherently based on sex."[10] Similarly the Second Circuit, in *Green v. Waterford Board of Education*,[11] agreed that a pregnancy leave rule applies only to women and constitutes a discrimination based upon sex.

On the other hand, the Fourth Circuit, in *Cohen v. Chesterfield County School Board*,[12] held that there was no reason to view a pregnancy leave rule as a sex classification since all of those similarly situated with respect to pregnancy are treated equally irrespective of sex. The Fifth Circuit, in *Schattman v. Texas State Employment Commission*,[13] rejected the notion

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[9] 404 U.S. 71 (1971).

[10] 465 F.2d at 1188.

[11] 473 F.2d 629 (2d Cir. 1973).

[12] 474 F.2d 395 (4th Cir. 1973).

[13] 459 F.2d 32 (5th Cir. 1972).

that regulations dealing with pregnancy are inherently or self-evidently based upon sex and agreed that "the fact that only a woman becomes pregnant does not nullify the pregnancy in the ensuing physical conditions."[14] The court refused to look beyond the face of the regulation and felt that it classified by pregnancy, rather than by sex.

Pregnancy leave rules establish two classes of persons: pregnant teachers and all other teachers. In order to find a sex classification one must go beyond the face of the regulation and somehow infer that a classification of pregnant teachers in fact applies to all women teachers, that is, that the regulation discriminated against the entire sex. This inference is, at best, metaphysical. Some female teachers choose not to have children while employed, others begin employment only after having had children, and still others are beyond child-bearing age and could not enter the regulated class even if they so wished. Thus substantial groups of female teachers are never affected by the rule.[15] Cases which argue that pregnancy leave rules are sex discriminations advance no reasons why "discrimination" only against female teachers of child-bearing age who have children or who might wish to have children while employed must be imputed to the larger class of all female teachers. One could argue that all female teachers ought to be free to have children while employed, but the discrimination still does not apply to all female teachers.

Pregnancy is not an inevitable incident of womanhood. Women can avoid pregnancy and thus can avoid falling within the regulated class. Not only, then, is the inference of sex classification unexplained, but it imputes discrimination against a smaller class, whose members entered voluntarily, to a larger class of persons bearing fixed biological traits. The objection to viewing a pregnancy leave rule as a sex classification arises primarily from the lack of any guiding principle which can control the impulse to view narrow classications as offending the interests of some larger group. There are many statutes and regulations to prevent hemophiliacs and colorblind persons from driving or holding certain jobs, and yet the judiciary does not customarily view such burdens as offending males generally. The fact that these sex linked traits exhibit their symptoms exclusively in males would be viewed as fortuitous and incidental to regulations which speak narrowly to the underlying conditions. A similar cultural habit of mind tends to prevent judges from viewing criminal rape statutes as offending males generally nor prosecutions of prostitution to females generally. If regulations dealing with pregnancy classify by sex, then an argument could be made that school boards offering pregnancy

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[14] *Id.* at 40.

[15] Statistics indicate that 22% of the female teachers in the Cleveland system are above child bearing age. Exact percentages for other unaffected classes cannot be determined from the statistics. Brief for Petitioners at 6, La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

leave with pay would discriminate against males, who could not possibly qualify for the benefits.[16] Moreover, cases finding a sex classification in a pregnancy leave rule do not provide any neutral principle or test which would avoid unnecessary disruption of state power to regulate conditions that may threaten state interests.

Those circuits which found such classifications have determined that the social and political importance of removing any obstacles which tend to impede the entry of women into the labor market overbalances the significance of administrative convenience and employee efficiency asserted by the employer. But the sex classification view leads to a misstatement of the issue. Actually the interests involved are much narrower. The precise question is whether females must be allowed to have babies upon their own terms while employed. The larger interests of women in equal economic opportunity and in equal pay for equal work are not offended by the pregnancy leave rule, and yet a finding of sex classification tends to prejudice the balancing of interests actually involved in the pregnancy leave case.

On a more technical basis the state legislature or school board could have adopted either of two possible classifications both of which would serve their interests in efficient employees and continuity of instruction. It could refuse to hire any women, or it could take the narrower course and adopt a pregnancy leave rule applicable to pregnant persons. The approach chosen implies a prior legislative rejection of the broader sex classification which the courts have found in the narrower pregnancy leave rule. Apparently there is no way that the legislature may classify with respect to pregnancy without running afoul of the sex discrimination charge. The legitimacy of judicial intervention on behalf of women's employment interests weakens when the classification used in the regulation indicates that the legislature has already balanced the interests of women employees against the efficiency and continuity interests threatened by pregnancy. Judicial broadening of the classification beyond the terms of the regulation has the characteristics of a manipulative device used to readjust a prior legislative balancing of interests.

On a more intuitive level it might be tempting to view mandatory leave policies as a product of a consistent pattern of sexual stereotypes which in the aggregate, tend to disadvantage all women. Perhaps the Sixth and Second Circuits felt that mandatory pregnancy leave rules cannot be approached as a discrete problem, but must be interpreted in a larger context of what the courts believe to be prevailing social attitudes. However, these courts should then have found as a fact that leave rules arise out of sex role sterotypes, and they ought to have given precise indications

[16] *Cf.* Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972), where ten minutes rest breaks for women in addition to those given men were held violative of Title VII of the Civil Rights Act of 1964.

of the relationship between these suspicions and the finding of sex classification in otherwise neutral regulations.

In fact, the sex classification issue has been employed to the exclusion of much more complex constitutional issues. The circuits tend to decide these cases on the basis of whether such rules classify by sex, when the real issue involves the question of whether effects of pregnancy threaten interests of the public employer to an extent which justifies the burdens imposed by the pregnancy leave rule. Resolution of the pregnancy leave case in terms of sex classification raises more questions than it answers. The circuits have not set forth any analysis of the various equal protection standards of review which may be applied to pregnancy, nor have they carefully considered the competing interests to be balanced in the pregnancy leave situations.

Furthermore, the finding of a sex classification in no way disposes of equality claims of pregnant persons. Under the evolving "newer equal protection"[17] the old rational basis test has been strengthened to require a higher degree of rationality between classification and purpose served. The emphasis given to the sex classification issue by the two circuits which struck down pregnancy leave rules indicates a misapprehension that an application of the "newer equal protection" depends upon the nature of the classification rather than any specific quantum of "rationality," and that some intuitive suspicion of unfairness is necessary to trigger the new standard. On the other hand, those circuits which have upheld these pregnancy leave rules deal with an entirely different issue when they emphasize the lack of a sex classification. If these latter circuits were merely preoccupied with the sex classification, they would still have to face the more precise question of whether these rules deprive *pregnant persons* of the "newer equal protection." By foreclosing the equal protection claim of pregnant persons through a finding that no sex classification exists, they must be holding that pregnant persons have no equality injury, or no equality interest to assert that will sustain an equal protection claim.

A finding of sex classification does, however, constitute a prerequisite to successful attack under the suspect classifications doctrine. Plaintiffs argue that sex classifications are suspect, and thus the sex classification issue does have direct relevance to the first argument raised in the pregnancy leave case.

II. The Suspect Classifictions Argument

Once a court determines that a pregnancy leave rule classifies by sex, it must decide whether sex classifications ought to be treated as suspect under the equal protection clause. If all sex classifications are suspect, the pregnancy leave rule would have to be justified by a compelling state

[17] *See* Gunther, *supra* note 5.

interest. Although this argument has been met by silence in all of the pregnancy leave cases, the literature abounds with arguments in favor of extending "suspect classification" treatment to women,[18] and at least one federal district court[19] as well as a state supreme court[20] have applied the doctrine to women outside the pregnancy leave context.

For purposes of review under the equal protection clause, the Supreme Court has developed the doctrine of suspect classifications applicable to race,[21] alienage,[22] and national origin.[23] When the Court applies this standard, the burden of proof shifts to the state to show not only that the regulation in question serves a compelling state interest but also that the regulation imposes the slightest burden possible consistent with achieving the statutory purpose on the class created. As a first step in the analysis, suspect classifications are presumed to lack rational relation to any permissible state purpose. Hence, classifications by certain external or congenital physical traits which are seldom relevant to the state interests of health, safety, and welfare may often be suspect.[24] If, as a historical matter, the community associates certain individual characteristics with the physical traits common to the group, the Court suspects that a classification is based only upon group identity and is not rationally related to the effectuation of a legitimate state purpose, which generally requires categorization by individual qualities.[25] Since classification by sex involves external physical traits from which the community infers certain ndividual qualities in members of the group, it follows that such classifications will produce suspicion of irrationality. However, suspicions of irrationality can be handled by means of the rational relation test, and as a general rule something more than cultural propensity to stereotype members of a group must be established before the group may qualify as a suspect class. Were it otherwise, practically every conceivable grouping based upon external physical traits would be suspect, including the mentally and physically handicapped and deprived.[26]

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[18] For a general overview of the literature containing such arguments see, Comment, *Are Sex Based Classifications Constitutionally Suspect*, 66 NW. L. REV., 481 (1971); 52 B.U. L. REV. 196 (1972); 40 U. CIN. L. REV. 857 (1971); 72 WISC. L. REV. 629 (1972); 25 VAND. L. REV. 412 (1972); Comment, *Loves Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1972); Note, *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065 (1969); Karst, *Invidious Discriminations*, 16 U.C.L.A. L. REV. 716 (1969); Brown et al., *The Equal Rights Amendment*, 80 YALE L.J. 871 (1971).

[19] United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).

[20] Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

[21] Strauder v. West Virginia, 100 U.S. 303 (1880).

[22] Takahashi v. Fish & Game Comm'n., 334 U.S. 410 (1948).

[23] Oyama v. California, 332 U.S. 633, 644-46 (1948).

[24] Frontiero v. Richardson, 93 S.Ct. 1764, 1770 (1973).

[25] This conclusion would follow from the assertions in the *Frontiero* plurality that external characteristics are irrelevant to underlying individual qualities.

[26] Frontiero v. Richardson, *supra* note 24.

The second step of analysis requires historical or empirical evidence demonstrating the tendency of legislatures to (1) stereotype the particular group in the legislative process, and (2) malevolently impose unequal burdens.[27] Absent evidence of legislative stereotyping and malevolence, the judiciary would be intervening on behalf of a class which is stereotyped through the random cultural choices of a free people rather than on behalf of one which is invidiously discounted through state action. The equal protection clause may legitimately be interpreted to restrict the freedom of legislature to reflect the discriminatory cultural choices of the people while distributing society's burdens, but there is no textual warrant for establishing strict standards of review until popular discriminatory attitudes clearly appear in the terms of statutes which allocate these burdens. An accidental or irrational burdening alone will not suffice, since the primary objective of the suspect classification doctrine is the defeat of state regulations which have the dominant purpose and effect of suppressing minorities, but which, at the same time, can be justified as being rationally related to some other subsidiary state interest. In this situation the judiciary has reason to suspect that legislators enacted burdensome laws with malevolent intent to suppress minorities and then justified such laws in terms of some marginal benefit to the state. The utility of the doctrine lies in its ability to overcome merely colorable justifications and thus invalidate a burdensome law while avoiding the difficult task of proving malevolent intent.

The question, therefore, immediately arises whether the alleged burdens imposed by sex classifications were the product of malevolent intent. Within the context of history, it becomes necessary to decide whether sex classifications have placed burdens upon women, and if so, whether malevolent intent was a significant factor. A brief analysis of race classifications will serve as a starting point. The legislative history of the Fourteenth Amendment bolsters the notion that the equal protection clause was intended to have particular protective effect upon ex-slaves.[28] In this context, there was ample evidence that slaves would be deprived of legal rights by legislatures. Specific statutes which created such classifications and imposed burdens upon ex-slaves reinforced the notion that legislative bodies were prone to enact laws with an overt or covert purpose of depriving that particular class of its rights.[29]

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[27] San Antonio Independent School Dist. v. Rodriguez, 93 S.Ct. 1287, 1311 (1973), states that the traditional indicia of suspectness are: a class saddled with disabilities or subjected to such a history of unequal treatment, or relegated to such a position of political powerlessness "as to command extraordinary protection from the majoritarian political process." The plurality opinion in *Frontiero* also implies a requirement that unequal burdens be reflected in the statutes before a suspect classification may be established. 93 S.Ct. 1764, 1769.

[28] Strauder v. West Virginia, 100 U.S. 303 (1880); Slaughter House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873).

[29] Plessey v. Furguson, 163 U.S. 537 (1896) provides the classic example of such a statute. Gomillion v. Lightfoot, 346 U.S. 339 (1960) provides a more subtle example.

In the context of sex classifications, however, there is no reliable historical evidence that legislatures deal with women in malevolent and insidious ways. Dower statutes, election statutes (taking against the will), the marital deduction, community property, alimony, maternal preference in custody contests, child support, and marital rights and duties are all aimed at easing burdens for the majority of women. It is difficult to argue that such statutes burden women or that they are the product of exploitative intent. The argument that these seemingly beneficent laws were part of a grand scheme to confine women to traditional roles has little basis in fact.[30] Even today women disagree as to their proper role, and notions of malevolence are hard to justify even on intuitive bases.

On the other hand, women's protective legislation, such as maximum work hour laws, exemption from jury service, maximum weight lifting laws, and exemption from military conscription, fall into a slightly different category since they arguably could have the effect of restricting the economic opportunity of women. The appropriate question is whether they were so designed. In the last century, many embryonic reform movements arose in response to conditions produced by the industrial revolution.[31] Women made very significant contributions to the reforms of that period,[32] and could chronicle with pride the passage of women's protective legislation.[33] The modern feeling, however, seems to be that the women's protective legislation growing out of this reform movement was tailored to exact a quid pro quo from women in terms of reduced economic opportunity. Irrespective of present day effects of these statutes,[34] the mo-

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30 *See* note 18 *supra*. *See also* Frontiero v. Richardson, 93 S.Ct. 1764 (1973). None of these authorities confront the array of judicial authority for the proposition that female protective legislation was designed to help women. On the bona fides of limiting contractual capacity of married women see Milliken v. Pratt, 125 Mass. 374, 382 (1878). On the bona fides of female protective legislation see Muller v. Oregon, 208 U.S. 412, 422 (1907); and West Coast Hotel Co. v. Parrish, 300 U.S. 397 (1937):

> What could be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers. . . . The legislature of the state was clearly entitled to consider . . . the fact that [women] are in a class receiving the least pay, that their bargaining power is relatively weak and that they are the ready victims of those who would take advantage of their necessitous circumstances.

300 U.S. at 398.

31 *See* 2 S. MORISON, H. COMMANGER & T. LEUCHTENBERG, THE GROWTH OF THE AMERICAN REPUBLIC, 81-103, 266-295 (6th ed. 1969).

32 *See* S. BRECKENRIDGE, WOMEN IN THE TWENTIETH CENTURY (1933); and V. SAPIEPKA, EMINENT WOMEN (1948). *See generally* NOTABLE AMERICAN WOMEN, 1607-1950; A BIOGRAPHICAL DICTIONARY (E. T. James ed. 1971).

33 *See* CLARA BEVER, HISTORY OF LABOR LEGISLATION FOR WOMEN IN THREE STATES; and FLORENCE SMITH, CHRONOLOGICAL DEVELOPMENT OF LABOR LEGISLATION FOR WOMEN IN THE UNITED STATES. (Women's Bureau, U.S. Dept. of Labor, Bulletin No. 66, 1929).

34 One may fairly doubt that these statutes hinder the economic freedom of the average woman as the modern literature alleges. Rather, they offend the identity of the middle class woman who was never intended as the beneficiary. Instructive for purposes of highlighting the class differences involved is INT. REV. CODE OF 1954, § 214, providing a deduction for housekeeping and child care expenses and necessarily presupposing a ready supply of cheap female labor to clean up after their more affluent "sisters."

tives for their passage must be ascertained in a manner consistent with the motives behind passage of similar types of reform legislation arising out of the same period in response to the same conditions.[35] These statutes were part of a consistent reform movement, and to assume some sort of conspiracy on the part of late nineteenth century reformers to suppress women in the latter half of the twentieth requires the further assumption of superhuman prescience.

In the absence of better evidence, no reason exists to suppose that nineteenth century sex classifications were anything but a sensible adjustment to nineteenth century conditions and needs. Indeed, it is hard to imagine that women textile workers at the turn of the century would have complained that maximum work hour laws for women interfered with their right to work sixteen hours a day, as opposed to ten. In the past, factory work demanded physical exertion to the point of debilitating the health of workers. Presses and cutters lacked safety equipment, lighting was poor, noise levels were high, and industrial accidents exacted extreme costs in life and limb.[36] Legislation protecting women from these hazards is not the traditional stuff of a suspect class. Such legislation hardly provides the sort of well-stocked environs in which one hunts for invidious discriminations.

The opinions which held that sex constitutes a suspect classification for purposes of review under the equal protection clause did so on the grounds that women have been treated with malevolence by society at large and legislatures in particular. *Sail'er Inn v. Kirby*[37] found explicitly that categorizing sex classifications as suspect is necessary to protect women from opportunity-restrictive laws, and *United States ex rel. Robinson v. York*[38] argued that a statute assigning women to a minimum security farm for indeterminate periods with release conditioned upon rehabilitation evidenced the need to treat sex as a suspect classification. The *York* court reasoned that the statute permitted detention of females for longer periods than males for the same offenses and that this aspect demonstrated legislative malevolence. In actuality, the statute was premised upon the notion that women are more amenable to rehabilitation than men and allowed early release predicated upon evidence of rehabilitation. The opinion did not deal with the legislative history of the statute but argued, nevertheless, that its obvious purpose was to mete out longer prison terms to women. Again, there was no statistical analysis of whether women did in fact serve longer average terms than men under the statute, nor had the particular

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[35] *See* J. LESCOHIER, HISTORY OF LABOR IN THE UNITED STATES 1896-1932; WORKING CONDITIONS, (1935); and E. BRANDEIS, HISTORY OF LABOR IN THE UNITED STATES 1896-1932; LABOR LEGISLATION, (1935).

[36] See material cited at note 35 *supra.*

[37] 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

[38] 281 F. Supp. 8 (D. Conn. 1968).

plaintiff in the case served anywhere near the total maximum sentence applicable to males.

Neither of these opinions mentioned the possible argument that inclusion of sex discrimination within the Civil Rights Act of 1964 and the subsequent ratification of the Equal Rights Amendment provide evidence that Congress presently feels that women deserve suspect classifications treatment under the equal protection clause of the Fourteenth Amendment. Although this position arguably has appeal, it fails to justify judicial intervention in the area of women's rights. Modern equal rights legislation conclusively demonstrates that the Congress and the states have the ability and the will to deal equitably with women. Just as legislatures in the past were solicitous of feminine welfare when they enacted women's protective legislation so modern legislatures demonstrate the same tendency when they approve remedial legislation providing women with equal economic opportunity. If the courts were to extend suspect classification treatment to women, they would be competing with the legislative branch, which has already demonstrated willingness to remedy inequality. Rather than nullifying legislative acts which burden the female sex, the courts would be establishing standards of solicitude in competition with those established by the legislative branch. They would review legislation on the basis of whether it was sufficiently solicitous of feminine welfare, rather than on the basis of legislative oppression. The extension of judicial protection to a class comprising 51% of the population presents further difficulties. If an absolute majority of the population feels oppressed, then it can protect itself through the electoral process. The fact that women have not united to exert power at the ballot box would seem to indicate substantial disagreement within the class, and would also indicate conflicting demands upon the legislative process from within that class. Perhaps the curious mix of domestic relations law, protective legislation, and equal rights legislation accurately reflects the inconsistent demands of women. Any judicial attempt to rationalize the conflicts might interfere with the proper legislative adjustment of competing interests.

At this juncture, it is important to note that in the application of the suspect classification doctrine to race, the requirement of malevolent intent has become progressively less significant. A line of lower court authority has misapplied *Swann v. Charlotte-Mecklenburg Board of Education*[39] by finding violations of equal protection in *de facto* situations which essentially lack malevolence or suspect purpose.[40] These lower court

[39] 402 U.S. 1 (1971).

[40] *See* Cisneros v. Corpus Christi Independent School Dist., 459 F.2d 13 (5th Cir. 1972), total abandonment of the de jure - de facto distinction where Mexican Americans attended predominantly Mexican American schools as a matter or cultural choice rather than state action; Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972), preferential hiring of minorities with lesser qualifications than whites ordered by the court on the basis of statistical imbalance alone; Larry P. v. Riels, 343 F. Supp. 1306 (N.D. Cal. 1972), unconstitutionality of IQ

"quota cases" focus on racial imbalance alone and abandon altogether the requirement of malevolent intent, thus the original libertarian premise underlying the doctrine has been replaced by a national interest in the organic unity of the population.[41] Quite unabashedly, the lower courts have arrived at the legislative judgment that all races will be equal, and that any demonstrable racial imbalance will be rectified without respect to whether it arose as a result of impermissible legislative acts or as a by-product of cultural choices uncontrolled by the state.[42] Some lower courts will presume that all racial imbalance is legislatively malevolent since the state has power to rectify that imbalance.[43] In a sense, the lower courts have injected the theories of Rousseau[44] and Hegel[45] into the equal protection clause in much the same manner as the Court in *Lochner v. New York*[46] identified substantive due process with the theories of Adam Smith.[47] But even if suspect classifications now reflect a national interest in organic unity of the population, the demand for a raceless and classless society rests upon entirely different legislative interests than the demand for a sexless society. To this extent, any case which would extend suspect classification treatment to women on the basis of statistical imbalance would fail to take account of the substantial difference between the legislative interests involved. *Culturally determined* sex roles do not present the same threat of civil discord as do *imposed* race and class roles. Thus we must infer that women do not merit suspect classification treatment

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tests where they lead to racial imbalance; Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), expenditure of HUD funds on low income housing in black neighborhoods held unconstitutional; Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), busing between Detroit and the surrounding county schools.

[41] Originally, the doctrine assumed that racial classifications had nothing to do with the underlying qualities of the individual. The plurality opinion in *Frontiero, supra* note 24 adheres to this view. The "state action" concept further demanded that the courts leave individuals alone to associate and discriminate as they please. Hence, individual liberty was a predominant theme of the fourteenth amendment.

[42] The end result of the demise of "state action" allows courts to force individuals into associations they would rather avoid. The sacrifice of individual liberty, speech, assembly, and association can be justified by the national interest in homogeniety. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 34 (1959). *But see* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960).

[43] The failure to perform "affirmative obligations" provides all the suspectness that is necessary.

[44] JEAN JAQUES ROUSSEAU, THE SOCIAL CONTRACT (W. Ebenstein ed., Great Political Thinkers, 3d ed. 1960), provides the cornerstone for all modern egalitarian statist concepts. Within Rousseau's framework, the courts now constitute themselves the interpreters of the general will and echo the ideal: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole." *Id.* at 445.

[45] Hegel espoused the notion that an individual can have no true identity apart from that derived from the collective achievements in support of the state. *Id.* at 600.

[46] 198 U.S. 45 (1905).

[47] ADAM SMITH, THE WEALTH OF NATIONS, advanced the theory of laissez faire economics. As the title suggests, Smith was mainly concerned with maximizing national power and was not overly impressed with the value of individual liberty for its own sake.

even within the latest line of cases interpreting the equal protection clause as a constitutional mandate for societal *gemeinschaft*.[48]

III. The Fundamental Rights Argument

A second argument for a strict standard of review arises within the context of mandatory pregnancy leave. Every citizen has fundamental rights that, as a matter of equal protection, may be interfered with only to serve a compelling state interest. Such rights include, in addition to specific enumerations in the Bill of Rights and penumbral rights thereto: voting,[49] procreation,[50] marriage,[51] interstate travel,[52] and marital privacy.[53] Note that in *La Fleur* the appellant argued that the regulation subjected her to unequal treatment by making continued employment contingent upon the non-exercise of her constitutional right to procreate. She also asked the court to establish a new fundamental right to work,[54] and argued that no regulation may unequally burden this requested right in the absence of a compelling state interest. The *La Fleur* court felt that the plaintiff's interest in the employment relation was of sufficient importance that a regulation may not interfere in an arbitrary and capricious way, but the court did not apply an "interference with a fundamental right" analysis. Also, in *Struck v. Secretary of the Defense*,[55] the Ninth Circuit rejected the argument that dismissal of a pregnant Air Force officer infringed upon her marital privacy, but no reasons for the rejection were given.[56]

The reluctance of the circuits to seize upon these doctrines in the pregnancy leave cases seems to cast doubt upon their ultimate reach, but these doctrines do apply with singular theoretical consistency. If the right to enjoy marital privacy and the right to procreate are in fact fundamental rights, school boards and other public employers would have a heavy burden in justifying a leave policy which burdens them. However, the lower courts' reluctance to discuss this theory may be due to the Supreme Court's opinion in *Dandridge v. Williams*,[57] which upheld a Maryland welfare scheme although it burdened the exercise of the right to procreate. In *Dandridge* the Court upheld an admitted state interest in encouraging fam-

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[48] This German word for "community" has strong Hegelian overtones. Apprehension that the judiciary might grant suspect classification status on this ground is not entirely unfounded. The plurality opinion in Frontiero v. Richardson, 93 S.Ct. 1764, 1770 and n.17 (1973), places great emphasis upon statistical imbalance.

[49] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[50] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[51] Loving v. Virginia, 388 U.S. 1 (1967).

[52] Shapiro v. Thompson, 394 U.S. 618 (1969).

[53] Griswold v. Connecticut, 381 U.S. 479 (1965).

[54] La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1213 (N.D. Ohio 1971).

[55] 460 F.2d 1372 (9th Cir. 1972).

[56] *Id.* at 1376.

[57] 397 U.S. 471 (1970).

ily planning[58] and noted that the state could allocate its limited resources in any rational manner and that no one had a fundamental right to public funds. At bottom, then, the pregnancy leave contest is over the public employee's "right" to work and a thousand dollars or so of compensation, as against the right of the governmental unit to promote the efficiency of its employees and the continuity of its functions. One has difficulty seeing why a public employee's interest in an extra thousand is more fundamental than the interest of the *Dandridge* welfare recipient in his thousand, or for that matter, more fundamental than the financial interests of the employer in *Lochner*.[59] Failure of the courts to grapple with these issues testifies to the limited reach of the "interference with a fundamental right" argument.

Moreover, recent developments since the pregnancy leave decisions have considerably weakened the fundamental right argument. In *San Antonio Independent School District v. Rodriguez*,[60] the Court held that education is not a constitutional right and that an unequal burdening of this right does not give rise to a compelling state interest standard of review.[61] This decision casts considerable doubt upon the fundamental rights method of attack in future cases. Recent decisions tend to apply the substantial rationality test to those instances which involve fundamental interests under the old "two-tiered model" of equal protection.[62]

IV. The Substantial Rationality Requirement

The Supreme Court had consistently dealt with sex classifications on the basis of a rational relation test;[63] however, *Frontiero v. Richardson*, indicates that this test may soon be abandoned.[64] The traditional rational relation test has undergone dramatic changes within the last few years and has been replaced with respect to certain equality interests by a substantial rationality requirement, sometimes referred to as the "newer equal protection" or the "Burger Court equal protection."[65]

Under the traditional formulation of the rational relation test, the Supreme Court has upheld female protective legislation, including exclusions from certain occupations.[66] The classic decision in *Goesaert v. Cleary*[67]

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[58] *Id.* at 473.

[59] The employer disliked the idea of paying higher wages. In the pregnancy leave case, the public employee misses her normal income. The former fell under the rubric of due process, while the latter falls under equal protection.

[60] 93 S.Ct. 1287 (1973).

[61] The right to education was established by Brown v. Board of Educ., 347 U.S. 483 (1954).

[62] *See* Gunther, *supra* note 5, at 12-15, 17-18.

[63] Reed v. Reed, 404 U.S. 71 (1971); Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 462 (1948); and Muller v. Oregon, 208 U.S. 412 (1908).

[64] 93 S. Ct. 1764 (1973).

[65] *See* Gunther, *supra* note 5, at 1.

[66] Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 462 (1948); and Muller v. Oregon, 208 U.S. 412 (1908).

upheld a statute which generally excluded women from jobs as bartenders, although it allowed them to be waitresses and bar maids and allowed wives and daughters of male tavern owners to tend bar. The statute was allegedly designed to protect female morality but the more likely purpose was protection of the male bartender's union from more comely competition, a clearly impermissible purpose from an equal protection standpoint. The Court declined to recognize this invidious motive and assessed the rationality of the statute only in terms of the alleged purpose. The Court refused to assess the limited effects such a law would have upon female morality, and in addition, reasoned that it could pass muster irrespective of its underinclusive nature. Apparently, it was sufficient that the law protects the morals of only a few women while leaving the morals of others similarly situated to the depredations of the bar room.

This pattern of deference to legislative sex classifications no longer applies. In *Reed v. Reed*,[68] an Idaho probate code provision preferring males to females among applicants for letters of administration in the same entitlement class was found unconstitutional for failure of the preference to relate in a rational manner to any state interest. The Idaho supreme court had previously upheld the statute, finding it rationally related to the state interest in avoiding hearings on the merits to determine which applicant was more qualified. The Supreme Court held that the state interest was insufficient to justify the legislative grant of preference to the male sex. The Court further held that the objective of reducing the probate caseload must be advanced in a manner consistent with the command of the equal protection clause. "To give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[69]

Despite the fact that *Reed* is couched in the phraseology of minimal rationality, a different analytical standard was used there. The statute read as follows: "Of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood."[70] In holding this stated preference irrational, the *Reed* Court reasoned that the preference did not relate to the purpose of assuring that administrators were as closely related to the decedent as possible. The terms of the preference itself suggest that its purpose might be to provide the most competent administrator, assuming that men, on the average, have more business experience than women,

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[67] 335 U.S. 462 (1948).

[68] 404 U.S. 71 (1972).

[69] *Id.* at 76.

[70] *Id.* at 73. IOWA CODE § 15-314 (1947).

but the Court refused to analyze its rationality as a means of attaining this objective. Actually, the Idaho scheme served a mix of several purposes. The primary purpose was to select administrators of the closest degree of kinship to the decedent as possible. When this primary purpose of kinship was satisfied by the presence of two equally related contestants, the terms of the sex preference served the purpose of selecting the more qualified administrator. The mandatory nature of the preference suggests a third purpose, that of reducing costs. The complete statement of the statutory purpose would be: To select administrators from the closest degree of kinship, but among competitors of equal kinship, to select the most qualified while incurring the least cost to the state in the selection process.[71]

The statute attacked in *Reed* was rather obviously rational in relation to this comprehensive mix of purposes. It is hard to conceive of a statute which would serve this mix with greater rationality and indeed it seems that the *Reed* holding can be attributed only to a balancing of the interest in female opportunity against the cost of providing such opportunity. Within the limited context of *Reed*, this opportunity cost is probably minimal because only the divorced parents of a deceased child would be competing for letters of administration.

The rationality standard applied in *Reed* has the disadvantage of clouding any helpful analysis of the values to be balanced. First, the state interest in saving money should not be branded as "mere avoidance of hearings" or "mere administrative convenience" and then dismissed as inconsequential. The legislative branch has the task of raising revenue and allocating funds to achieve state purposes. If the judiciary is going to intervene in this process, it ought to estimate the exact dollar costs to be assessed on behalf of the particular interests of the class it seeks to protect. Second, it is unclear from a rationality analysis whether the judicially protected interest of female opportunity must be achieved at all costs or whether this interest will only be protected at a reasonable cost when a reasonable percentage of females will accrue practical benefits. It would be interesting to find out how many women could win on the merits in the Idaho contests for letters of administration, and whether this percentage could reasonably justify the costs.

The latest Supreme Court case on sex classifications seems to abandon rationality as a test for judicial intervention, but establishes no standard of review to take its place. In *Frontiero v. Richardson*[72] eight justices struck down a provision under a federal statute disallowing dependents' allowances to women members of the armed forces who could not prove the economic dependence of the male spouse. Male members of the armed

[71] This method of analysis has been borrowed from Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

[72] 93 S.Ct. 1764 (1973).

forces were given such allowances without regard to the actual economic dependence of the female spouse. Four of the justices felt that sex should be treated as a suspect classification under the Fifth Amendment's due process clause. One justice concurred because the statute constituted "an invidious discrimination in violation of the Constitution."[73] Three justices concurred in the judgment on the authority of *Reed*, and one justice dissented.

The plurality opinion extended suspect classification treatment to women on the grounds that they had been stereotyped in past laws and because Congress and a majority of the state legislatures have indicated that women's equality interests deserve a strict standard of judicial protection. Despite the rather obvious fact that women have been stereotyped in past laws, the historical evidence indicates that laws which embody the female stereotype have been designed, in the majority of cases, to protect women and ease their burdens. Furthermore, there is no evidence that a majority of women have disapproved of legislative sex classifications. Thus there should be no judicial suspicion of unfair or unjust legislative balancing where such classifications are used. Due to the apparent majoritarian approval by the class allegedly discriminated against, an analogy of sex classifications to race classifications is completely inapposite. Finally, the reference to Congress and the state legislatures is ludicrous; if these legislative bodies seek to protect the interests of women, they can do it themselves rather than passing off responsibility to an appointed judiciary. The notion that judges should establish competing standards of solicitude for a class which the legislature already seeks to protect is indeed a novel interpretation of judicial review.[74]

The inability of a majority of the justices to agree on any single equal protection standard demonstrates dissatisfaction with the "two tiered" system established by the Warren Court.[75] The lack of agreement also indicates dissatisfaction with suspect classifications and rationality as the tools of equal protection analysis. The Court might possibly be heading toward a single standard of invidiousness which will trigger equal protection scrutiny along a sliding scale of values depending upon the relative need for protection of the classification which is injured.[76]

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[73] *Id.* at 1773.

[74] The initial purpose of judicial review was to refuse enforcement to legislative acts which were inconsistent or repugnant to the Constitution. This power was never intended to confer upon the judiciary the legislative and executive power to replace legislatively chosen means of achieving a constitutional end with more effective judicial remedies for achieving the same end.

[75] The Warren Court established strict scrutiny under "suspect classifications" and "fundamental interests" while it reviewed most legislative acts under the minimal scrutiny standard of the rational basis test. *See* Gunther, *supra* note 5, at 8-12.

[76] Support for the notion may be gathered from the concurrence of Justices Stewart and Powell in *Frontiero*. Also, Weber v. Aetna Casualty & Surety Co., 406 U.S. 715 (1972) struck down a statute which discriminates against illegitimates without mentioning the suspect classi-

The result in *Frontiero* cannot readily be explained through any of the analytical devices used in the "newer equal protection" cases such as *Reed*. A preliminary statement of the legislative purposes served by the challenged statute would be to make the armed forces more attractive to married individuals with dependents but at the least cost to government. The *Frontiero* Court focused upon the relevance of the sex classification to the governmental interest in cost savings and found that forcing women to prove actual dependence of the male spouse is underinclusive with respect to the cost saving interest. Obviously, the way to cure this underinclusiveness and to eliminate the sex classification would be to require that all married members of the armed forces prove actual dependence. However, the underinclusiveness of the sex classification suggests a congressional conclusion that attracting married males into the armed forces requires greater inducements than attracting married females. Dependency allowances without regard to actual dependence may have been necessary to attract married males into the combat arms, while such allowances were not necessary to attract married females into clerical and medical positions.[77] The sex classification thus suggests a fuller statement of the governmental purposes underlying the statute, those of attracting personnel into the armed forces, but only to the extent that extra inducements are necessary and at the least cost to the government.

The result in *Frontiero* cannot rest upon the lack of a rational relation between the statutory classifications and the purposes served. It has been suggested, however, that the newer equal protection *demands* that the statutory classification serve *a rational state purpose*. *Roe v. Wade*[78] and *Eisenstadt v. Baird*[79] may be read as imposing an equal protection restraint upon governmental and state objectives.[80] At the very least, these cases suggest that state interests in the preservation of morality are insufficient to overcome the societal interest in the welfare of the individuals affected by the laws attacked. But providing inducements to enter the military is an eminently rational goal, and the provision of additional incentives to that class which risks combat duty also seems to be a thoroughly rational purpose. The governmental interest in providing these benefits at least cost is always rational. Although governments at various levels may have

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fications doctrine. *See* James v. Strange, 407 U.S. 128 (1972); and Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

[77] All males risk direct combat duty irrespective of primary miltiary occupational skill.

[78] 410 U.S. 113 (1973).

[79] 405 U.S. 438 (1972).

[80] Whenever statutes attempt to impose "traditional" moral notions, the classifications used are likely to be found irrational. Roe v. Wade, *supra* note 72; Eisenstadt v. Baird, *supra* note 79; and Weber v. Aetna Casualty & Surety Co., *supra* note 76, are consistent with this view. These cases are more concerned with proscribing the substance of the laws attacked than with supervising the constitutionality of the means used.

abundant resources, these resources are limited, and thus many socially desirable equality interests must be sacrificed to fiscal necessity.

Frontiero indicates that the nature of the classification will determine the extent of judicial scrutiny. This analysis derives force from *Dandridge v. Williams*[81] and *San Antonio Consolidated School District v. Rodriguez*[82] which present conflicts between the equality interests of the poor and the state's fiscal resources. The only difference between these latter cases and *Frontiero* was the undefined and indiscrete nature of the classification denominated within the label "poor." In the abstract, the discreteness of the classification should not make any difference, for from the standpoint of social justice, one may reasonably doubt that discrete classes merit judicial intervention more than the economically disadvantaged. Futhermore, persons falling within an economic classification are as precisely ascertainable at any given point in time as are women.

Frontiero, however, presents larger problems than either *Dandridge* or *Rodriguez* since other equality interests which Congress may seek to protect conflict with the equality interest asserted by women with non-dependent husbands. Fundamental fairness requires, for example, that people receive equal pay for equal work. Since women members of the armed forces do not incur the same risks as men, one might cogently argue that women should not be given financial benefits of the same magnitude. But equally as important as a sex classification, single persons have a demonstrable equality interest in being paid as much as married persons for the same work. Arguably, the irrelevant fact of marital status should not entitle married persons to additional allowances for the same work. From the single person's standpoint, it is bad enough that dependency allowances are granted at all, let alone to males with non-dependent spouses, and the court further injures this equality interest when it extends availability of such allowances to married women. No rule can be discovered from the reasoning of the case to determine how the Court selects from this spectrum of competing equality interests the one which must prevail, nor is there any hint as to the relative weight such an interest must bear in the legislative balancing process.

The pregnancy leave case presents the question whether any reason exists for treating pregnancy differently from physical illness. While probing for evidence which would justify different treatment the courts tend to emphasize statements by physicians to the effect that each pregnancy is *sui generis* and that many pregnant women can work until delivery without experiencing medical difficulties or decreased efficiency. But the fact that many, or some, pregnant women would not have a detrimental effect upon the interests of the state or school board has little direct rele-

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[81] 397 U.S. 471 (1970).

[82] 93 S.Ct. 1278 (1973).

vance to the issue of whether many other pregnancies would injure those interests. Furthermore, the inquiries into the ability of "many" pregnant teachers to work up until delivery has no relevance to the issue of whether medical differences exist between pregnancy and illness justifying a difference in treatment. The appropriate inquiry would be whether pregnancy would in "many" cases result in inefficiency or suddenly occurring disruptive medical complications if pregnant persons were allowed to work as long as they wished. From the evidence, it appears that many pregnancies result in decreased efficiency and sudden medical complications,[83] and it would seem that the state has power to prevent and eliminate these ills within the ranks of its employees. Thus the precise questions become whether other diseases give rise to the same disruptions and inefficiencies as pregnancy and whether any distinction exists between these other diseases and pregnancy that would justify different treatment. While diseases and accidents can produce disruption of activities and impairment of efficiency just like pregnancy, the distinguishing aspect of pregnancy is that it results from a course of voluntary behavior which makes the impending loss of efficiency predictable. In contrast, the presence of disease or the occurrence of an accident is usually not known until incapacitating symptoms are present. Thus the state cannot force the victims of disease and accident to take leave before the decreased efficiency and other disruptive symptoms have already caused the damage which a pregnancy leave rule is designed to prevent.

For purposes of analysis there remains a small but important class of medical ailments such as cateracts or prostate troubles which, although contracted involuntarily, nevertheless give prior warning of impending inefficiency and disruptive medical consequences. Evidence whether this precise class of diseases differs from pregnancy has relevance to the equal protection claim, for it is only with respect to this limited class of diseases that pregnant women receive different treatment. The pregnancy leave cases have failed to focus on this precise question and only speculation exists whether the ultimate inefficiency and disruption brought about by a gradually debilitating disease is precisely predictable at some future date and thus distinguishable from complications arising out of pregnancy which develop unexpectedly throughout the term.[84] It may well be that few employees faced, for example, with blindness or cancer would choose to remain on the job and undergo the catastrophic physical consequences which would accompany inefficiency. In the cases of illness with long term predictable effects, the state might well conclude that the drastic personal consequences of not taking leave make it probable that each affected

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[83] *See e.g.*, Brief for Petitioner at 98a, 99a, 103a, 109a,-118a, La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

[84] *Id.*

employee will voluntarily go on leave before the state's efficiency interest is threatened. In the case of pregnancy, many medical complications are often temporary and are insufficient to insure that all pregnant employees will take leave before inefficiency and disruption set in. This rational distinction could, perhaps, be supported with medical evidence, but to date none has been produced. Curiously though, the very fact that pregnancy leave is mandatory may indicate that pregnant employees will not leave voluntarily. Thus the classification created by the terms of the statute may support the view that the personal consequences of pregnancy are temporary and less drastic to the employee than those presented by long term disease, although each presents a similar threat to the state interest in efficient employees and minimization of disruption.[85] The pregnancy leave rule is a rational tool for preventing pregnant persons from saddling the state with the effects of their pregnancy,—effects which seldom threaten serious permanent harm to the pregnant individual. Unfortunately, the cases do not focus on the issue and none cite evidence relevant to it.

A lesson may be learned from this failure, for whenever a rule or statute is attacked under the rationality test of the "newer" equal protection, the party defending the statute must stay close to he obvious purpose suggested by its terms. The suggestion that a pregnancy leave rule, rather obviously designed to force pregnant persons to take leaves they would not otherwise take, is related to the health of the mother, or the prevention of snide remarks, or having an identifiable date upon which to replace her can only invite disaster.[86] Under the newer equal protection, attorneys must decipher the real purpose of the statute directly from its terms and then gather evidence to support the reasonableness of the classification created. Casting around for all sorts of imaginary and marginal purposes simply will not save a statute and will often serve to arouse judicial suspicions of invidious purposes. In addition, it is often a simple matter to demonstrate lack of rationality to such marginal purposes.

Analytical parallels to the pregnancy leave rule can be seen in statutes which require public employees to retire at age sixty-five and in statutes which forbid minors to marry, vote, work, or drive. In these statutes the state applies a conclusive presumption of senility to those reaching sixty-five and a conclusive presumption of immaturity to those under the age of eighteen. For the sake of convenience, the state treats all members of each class alike and does not hold senility or immaturity hearings for

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85 This follows despite absences of recollection to this effect by actual draftsmen of these rules. *See* testimony of Dr. Mark Shinnerer, Brief for Petitioner, at 166a-88a, La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

86 The testimony of Dr. Shinnerer can only be disasterous in light of the judicial aversion to moral prudery in legislative acts concerning contraceptives, abortion, and reproduction in general.

the individuals involved. If the pregnant employee has the right to be treated as an individual, then arguably, the same right should be extended to the aged and the adolescent. The fact that "many" persons could perform efficiently until age eighty-five probably will not deprive the state of power to treat all sixty-five year olds equally, provided the state can show that many do lose efficiency at this age. The same argument applies to adolescents. A state is not required to accept the word of a twelve year old or his physician that he is capable of driving, working, marrying, or voting. The state will always have the power to stereotype twelve year olds and treat each of them as if they conform to the adolescent norm.

An intuitive or normative weakness in the claim of aged or adolescent persons to individual treatment stems from the fact that some stereotypes are useful. Legislative assumptions that no one under eighteen will vote intelligently, or that all persons above the age of sixty-five are inefficient, or that all murderers deserve life sentences, or that job applicants with college degrees will be the more competent employees, represent useful codifications of experience. In each case, the severe injustice placed upon individuals who do not fit the mold is tolerated for lack of more accurate methods of ascertaining individual qualities.

But in one crucial respect, pregnancy leave differs from the equal protection claims of the aged and the adolescent. Many individuals above the age of eighteen are immature and many under the age of sixty-five are inefficient. The adolescent and the aged are thus treated unequally with respect to conditions occurring in the unregulated class of middle age. Under these facts, a clear equality injury is shown. But if this were not the case, if senility and immaturity could never occur between the ages of eighteen and sixty-five, then laws which stereotype by age could not produce any equality injury or offend any equality interest. This distinction highlights the most significant aspect of the pregnancy leave case, for if senility and immaturity never occurred in the middle ages, then the adolescent and the aged could not show any equality injury arising out of such statutes.

V. Equality Injuries and the Concept of Equal Protection

All legislation burdens some classes and confers benefits upon others. Those who suffer statutory burdens have a minimum claim that the statute bear a reasonable relation to a state purpose. "And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[87]

With a substantive due process attack upon economic regulations pre-

[87] Nebbia v. New York, 291 U.S. 502 (1934).

cluded after 1937[88] plaintiffs resorted to the equal protection clause,[89] and a similar rational basis standard was developed in order to preclude attacks upon regulatory statutes. "The constitutional safeguard of equal protection is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[90] Due to the improbability of successful attack under this minimal rational relation equal protection standard,[91] no theoretical distinction between the respective injuries necessary to support due process attacks and equal protection attacks has formally developed in the case law. Presumably, however, any injury will give rise to a due process claim, while only equality injuries will support an equal protection claim.

The land mark equal protection cases upholding statutes under the minimal rationality standard, give a rather uniform picture of the types of equality interests which will produce an equal protection claim.[92] In each of these cases, the complaining party was treated unequally with respect to a condition shared by an unregulated class which received a distinct competitive advantage. Characteristically, the equality injury could be remedied by broadening the classification to include others similarly situated with respect to the states interest. Although it would be more valuable to the plaintiffs if the judiciary would preclude state regulation in the field as a matter of substantive due process, it is nevertheless in the plaintiffs' interests to remove from the statute books classifications which confer advantages upon competitors.

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[88] McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38.

[89] McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical, 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Goessart v. Cleary, 335 U.S. 464 (1948); Railway Express Agency v. New York, 336 U.S. 106 (1949).

[90] McGowan v. Maryland, 366 U.S. 420 (1961).

[91] *Morey v. Doud* has been the only equal protection attack to succeed.

[92] In Railway Express Agency v. New York, 336 U.S. 106 (1949), the statute under attack permitted advertising on the side of trucks relating to the business of the owner, but prohibited such advertising for hire. The under inclusiveness of the classification with respect to the state interest in eliminating distractions gave companies owning their own trucks an advantage over carriers for hire who rented space on the side of their vehicles. The statute attacked in Williamson v. Lee Optical, 348 U.S. 483 (1955), prohibited fitting glasses except upon prescription of a licensed optometrist or physician, but exempted sale of ready to wear glasses if selection was at the discretion of the purchaser. The under inclusiveness created by the exemption gave ready to wear producers a competitive advantage over opticians similarly situated with respect to the evils of unprescribed eyewear. In Morey v. Doud, 354 U.S. 457 (1957), an Illinois statute placed a myriad of restrictions upon sellers of money orders but exempted American Express by name. The under inclusive classification, created because of American Express' financial stability, gave the company an accute advantage over its competitors in the money order business. McGowen v. Maryland, 336 U.S. 420 (1961), involved a Maryland statute forbidding Sunday sales but exempting a long list of items and activities. The under inclusive classification put the convicted retailer at a distinct competitive disadvantage to others similarly situated but exempted, as part of an effort to curb the evils of Sunday sales.

If, in the case of the restrictions imposed upon adolescents and the aged, immaturity and inefficiency were absolutely unknown among the middle-aged, then it would be impossible for the legislature to remedy inequality by broadening the classifications created, that is, to broaden the pertinent statute to include the middle-aged. Although the middle-aged would enjoy an advantage over the young and the old, this advantage would not be one unequally granted by the statute, and an equal protection remedy would be powerless to remove the advantage. Irrespective of whether the laws impose burdens on all immature and inefficient persons as individuals or presume an equal distribution of the undesirable qualities throughout the respective classes, the classes still bear their burdens without the aid of any equal protection claim with respect to the classification of middle age.

The only equality injury of which the adolescent or aged could complain would be the over inclusiveness of the classification. Mature adolescents and competent aged persons are treated the same as the immature and senile within their respective age groups. However, the over inclusive classification does not produce any equality injury between the regulated and unregulated classes as a whole. Although, for example, mature adolescents might wish to be treated equally with adults, nevertheless, the statutory classification depends upon the probability of immaturity among all individuals comprising the class, and thus the mature adolescent could not show any equality injury between the classification into which he has been put and the unregulated class of adults. The mature adolescent could claim that the classification of adults should be broadened to include him, but this argument for narrowing the regulated class would necessarily rely on the equality interests of sub-sets of persons within the statutory classification as a whole. Thus under our assumption that immaturity and inefficiency never occur within the unregulated classes, no equality interest exists which will justify broadening the classification nor can any be found to justify narrowing it.

The overbreadth situation presents policy considerations which militate against judicial cognizance of an equal protection claim. An overbroad classification is all that can be required of the legislature in terms of exposing itself to political retribution. Any judicial attempt to narrow the classification could not make it more just from a legislative perspective.[93] Since

[93] The concurrence of Justice Jackson in Railway Express v. New York, 336 U.S. 106 (1944), supports this point.

> The burden should rest heavily upon one who would persuade us to use the Due Process Clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of Due Process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on Due Process grounds leaves ungoverned or ungovernable conduct which many people find objectionable.
>
> Invocation of the Equal Protection Clause, on the other hand, does not disable the

a legislature always incurs more than the required minimum of electoral disfavor when it classifies overbroadly, one must presume that no practical alternative classification existed or that the legislature sought to achieve some overriding equality value within the regulated class. It is not hard to imagine that the state interest in treating all sixteen year olds equally with respect to voting, drinking, driving, working and marrying more than justifies the unfairness to atypical individuals. This same state interest behind the overinclusive pregnancy leave rule was suggested in rather unchivalrous terms by the *Schattman* court when it suggested that a flexible rule would cause jealousy and recrimination.[94]

In the pregnancy leave rule situation, the court cannot broaden the classification since it already applies to all pregnancies. There is no competitive advantage which judicial broadening could possibly take away. The argument that each pregnancy must be treated on an individual basis amounts to a claim that the classification must be narrowed to the point where it ceases to exist. This amounts to an effective substitute for substantive due process; the requested relief prevents the state from classifying at all with respect to a condition which threatens state interests.

Non-pregnant employees do not receive any competitive advantage from the operation of a pregnancy leave rule. Their pay does not increase, their initial employment prospects are not improved, nor do they gain seniority for promotion purposes. If the pregnancy leave rule is struck down, the competitive interests of non-pregnant teachers do not change in the slightest degree. They lose no advantage because none was conferred, and they could care less whether the rule survives. In sharp contrast, the demise of the sex classification in *Goesaert v. Cleary* would have placed the male bartender's union in a far worse position. Justifiably, they would have lost a statutory monopoly advantage, with a lower wage rate and possible unemployment at the margin. Similarly, in *Reed*, the males lost their guaranteed competitive edge over women when the classification according to sex was held unconstitutional. Thus, the claim to individual treatment in the pregnancy leave case should not be confused

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> governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states, and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112-13.

[94] 459 F.2d 32, 39 (5th Cir. 1972).

with the genuine equal protection claims of women to have their skills evaluated on an individual basis when competing with males.

In order to present an equal protection claim, reliance must be placed upon the equality interests of the classification created. One simply cannot rely upon the equality interests of the class in order to narrow its applicability. If it could be shown that an overinclusive statute was legislatively invidious, then a member of the class ought to be able to rely upon a due process right to escape from invidious burdens. But invidiousness alone ought not trigger an equal protection claim unless the class can demonstrate an equality injury.[95] It would be somewhat illogical for courts to recognize equal protection claims of individuals within an overbroad classification to be treated like members of an unregulated class which never experiences the regulated condition.[96] In the pregnancy leave case there can be no rational method of narrowing the classification since the risk of sudden medical complications is spread uniformly throughout the class. Not only does the pregnant employee fail to demonstrate any method of subdividing the class with respect to the predictable risk of sudden medical complications arising out of her condition, but she cannot show any equality injury since non-pregnant persons never share these risks.

On the other hand, there is a line of cases which take cognizance of the equal protection claims of underinclusive classifications where neither class gains any advantage over the other. This unique equality interest was recognized in the cases which ordered "separate but equal" golf courses and swimming pools integrated.[97] Although whites realize no competitive advantage from the separate facilities, the Court found that isolation by race stygmatized the black race and branded them as second class citizens. This psychic injury was sufficient to sustain an equal protec-

[95] As a matter of fact, most racial classifications are underinclusive and over inclusive at the same time with respect to the same state interest. For example, a statute denying the vote to blacks is under inclusive with respect to the interest in assuring qualified electors since many whites are not qualified. It is over inclusive with respect to the same interest since many blacks are qualified. Thus the strongest inference of legislature invidiousness arises whenever any classification is both under inclusive and over inclusive. An intelligent argument can be made that any classification which is over inclusive and under inclusive with respect to the legislative purpose should be treated as suspect irrespective of the race of the class affected or the geographic region of origin of the statute. It follows that suspect status should not be granted to discrete classes for all purposes of equal protection review. This particular analytical mode would provide a neutral principle for expanding the applicability of the doctrine and would free it from the shackles of judicial ideology.

[96] While discussing the problem of overinclusiveness in Tussman and TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351-52 (1949), the authors note that the courts have preferred to deal with over inclusiveness in due process terms but argue that equal protection should cover the situation. To the contrary, in those admittedly rare cases of pure overinclusion, the classification is premised upon the uniform distribution of a particular risk to state interests within the class. There is no rational way in whch to narrow that classification since all members are subject to the same risk.

[97] Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. Atlanta, 350 U.S. 879 (1955); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958).

tion claim to a broadening of the racial classifications contained in the separate but equal ordinances. If, however, whites were inherently incapable of playing golf, it would be hard to argue that state maintenance of a golf course (or the failure to maintain one) would stygmatize blacks. It is only when races are treated separately with respect to the same conditions that the psychic injury may arise. For example, if all blacks were required to take a test for sickle cell anemia, an equal protection attack upon the statute should fail. The statute would be overinclusive with respect to its purpose of detecting sickle cell anemia since many of the individuals within the regulated class do not posses the trait. But the class as a whole could not show any equality injury. Only the irrational or hypersensitive could argue that such a law would stygmatize the class. Broadening the classification to make all persons undergo such tests would be irrational, since the condition never occurs among whites. Thus any complaint against the statute would have nothing to do with the equality interests of the classification created, and members of the class could only argue that the regulation deprived them of due process of law. If the sickle cell anemia law were passed with malevolent intent to burden blacks, then it should be struck down on due process grounds, but the classification would not necessarily share this invidiousness. In this case the legislative purpose would be invidious and a claim for relief should not depend upon equality interests offended. In contrast, if the legislature invidiously created an underinclusive classification with respect to a permissible state purpose, then an equal protection claim arises, however, the hypothetical sickle cell anemia statute would give rise to no such claim.

In order to statisfy the skeptic, return to *Lochner* and assume that the same case were to arise today under the "newer equal protection." *Lochner* struck down a statute restricting hours of bakers as violative of substantive due process.[98] But if the same facts were to arise after the pregnancy leave case, the original result could be achieved without resort to substantive due process. Very simply, Lochner could argue that the purpose of the statute was to protect the health of workers, and that the long hours of butchers and candlestick makers also threatened the state interest in a healthy labor force. Singling out bakers for hour limitations shockingly and invidiously denies them equal protection of the laws. At trial Lochner could stage an impressive array of doctors to testify that the health of bakery employees varied widely depending upon conditions in the particular shop. Perhaps the expert for the state would concede that each bake shop was *sui generis* and should be treated as such if possible. Lochner could insist that he be treated as an individual and that the word of his physician on the health of his employees must be accepted

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[98] *Lochner* was overruled in Bunting v. Oregon, 243 U.S. 426 (1917).

as long as butchers' and candlestick–makers' maximum hours were not regulated.

Under this latter day *Lochner* hypothetical, the Court need never inquire into the rationality, invidiousness, or "suspectness" of the classification, because *Lochner* has presented no equal protection claim at all. Broadening the classification to include butchers and candlestick makers will not remove any statutory competitive advantage, nor will it benefit Lochner in any way. Actually, he wants to be free of such restrictions himself. He seeks to escape the burdens imposed upon an over-inclusive class and thus he forsakes any reliance upon the equality interests of the class as a whole.

Thus stripped of his equal protection claim, this latter day Lochner is relegated to the status of a substantive due process claimant where he loses on the basis of stare decisis. Yet Lochner's equal protection claim is certainly no weaker than that of the pregnant public employee. It does her absolutely no good to broaden the classification to force males to take paternity leaves nor do these plaintiffs want mandatory leaves for illnesses. Rather, as an individual, each plaintiff seeks to escape the burdens imposed upon an overinclusive class. Any equality interest of the class from which they seek escape is thus irrelevant to their claims.

VI. Conclusion

Because the pregnancy leave rule deals precisely and narrowly with an avoidable condition it does not classify by sex. If sex classifications are suspect, the resulting stringent standard of review cannot rationally be applied to a pregnancy leave rule. But even if pregnancy leave rules do constitute sex discrimination, granting suspect classification status to women cannot be justified. First, a discrete majority of the population may always protect itself through the legislative process if it is genuinely repressed. Thus women do not need judicial protection. Second, under the limitations inherent in the concept of judicial review, legislative solicitude for women's equality interests precludes, rather than mandates, judicial intervention. Finally, as a historical matter, the female legislative stereotype reinforced the values of the majority of women, and there is no evidence that a majority ever objected to the stereotype. For these reasons, sex classifications are completely inapposite to race, alienage, and national origin. Although pregnancy leave rules do not classify by sex and although women do not merit suspect classifications treatment, the Court may nevertheless strike the rule down if it fails to meet the more stringent rationality requirement of the newer equal protection. The difference in treatment between pregnancy and illness will satisfy that test if it can be shown that victims of diseases with long term predictable effects will voluntarily take leaves before any impairment of efficiency or

disruptive conditions set in and if it can be shown that many women will not take leave voluntarily before inefficiency and disruptive complications occur. In all probability, however, the Court will be able to strike down the statute by ignoring purposes, framing the purpose as a unitary value, and by manipulating the level of abstraction irrespective of whether this showing of rationality is made.[99]

The most novel and singular aspect of the pregnancy leave case arises out of the fundamental inconsistency between the asserted equality interest and the relief requested. Non-pregnant employees receive no competitive advantage from the rule and thus no inequality exists which can be cured by broadening the classification to force paternity leaves or to force sick leaves. Since women alone become pregnant, there can be no badge of opprobrium which would justify per se invalidity of classifications by pregnancy. Finally, since pregnant employees claim the right to have their pregnancies treated on an individual basis, they are in fact seeking relief from a classification which is over-inclusive with respect to the state interest protected. An individual claim to escape the classification created cannot draw support from any equality interest possessed by that class.

If the court takes cognizance of an equal protection claim in the pregnancy leave case, it will provide an equal protection claim whenever a statute imposes burdens or benefits. Under the old minimal rationality standard, this extension of equal protection sub-strata would have made little difference, but with the advent of the "newer equal protection" and the higher rationality requirement, the results under the old substantive due process cases will be attainable under the rubric of equal protection. Although this result may have ideological appeal, it is theoretically untoward. Thus, in the pregnancy leave case, the ultimate question whether burdens imposed by pregnancy leave rules are reasonable in light of the alleged threat to state interests should be resolved by balancing under due process rather than equal protection.

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[99] *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 132-38 (1973).